No. 2234

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

VS.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, DISTRICT OF IDAHO.

EDWIN SNOW,
Attorney for Defendant in Error.

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STATEMENT OF FACTS.

The complaint alleges that the defendant is occupying, for the purposes of a reservoir for irrigation, certain lands on the Fort Hall Indian Reservation, under the authority of the Secretary of the Interior, pursuant to the act of Congress of March 3, 1891, granting rights of way for canals and reservoirs. It is shown on the face of the complaint that the approval of the Secretary of the Interior was duly given on June 27, 1908, and that the defendant company has constructed its reservoir and has impounded therein a large body of water to be used in irrigating certain arid lands in Bannock County, Idaho. As we understand it, the

government in this suit desires to question, by an action at law, instituted to recover damages for the use of this property, the authority of the Secretary of the Interior, under this act, to make a grant of right of way over an Indian reservation. To the complaint filed in the lower court defendant filed a general demurrer which was sustained. The government refused to plead further and the action was dismissed. The government appeals.

ARGUMENT.

Section 18 of the act of March 3, 1891 (26 Stat. 1101, Vol. 6, Fed. Stat. Ann. p. 508), provides:

> "That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals and fifty feet on each side of the marginal limits thereof; . . . Provided that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of waters for irrigation and other purposes under authority of the respective states or territories."

Section 19 of the act provides:

> "That any canal or ditch company desiring to secure the benefits of this act shall . . . file with the Register of the land office for the district where such land is located a map of its canal or ditch and reser-

> voir and upon the approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. . . ."
>
> Fed. Stat. Ann., Vol. 6, p. 509.

It is to be noted that the grant provided for in the act of Congress above recited is "over the public lands *and reservations* of the United States." The question to be determined, then, is whether an Indian reservation is "a reservation of the United States" within the meaning of the words as therein used.

> "The term 'reservation,' as used with relation to the public lands, means a withdrawal of a specified portion of the public domain from the administration of the land office and from disposal under the land laws and the appropriation thereof for the time being to some particular use or purpose of the general government."
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> 32 Cyc. 858.
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> Territory v. Burgess, 19 Pac. 558, 1 L. R. A. 808.

In the case of Leavenworth, Lawrence & Galveston Railroad Co. v. United States, 92 U. S. 733, at page 747, the court said:

> "Every tract set apart for special uses is reserved to the government to enable it to enforce them. There is no difference in this respect whether it be appropriated for Indians or for other purposes."

In that case, it was contended that the exception in the statute under consideration was of lands reserved "to the United States," whereas, the lands in controversy were, in fact, reserved to the Osage Indians, but the court said:

> "The verbal criticism that these lands were not within the meaning of the proviso, 'reserved to the

United States,' is unsound. In one sense they were reserved to the Indians but in another and broader sense to the United States for the use of the Indians."

In the Hot Springs cases, 92 U. S. 698, the court said that a reservation of lands for future disposal was a reservation "to the United States."

In the case of Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114, the court was considering a grant of lands and right of way to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway & Telegraph Co.

14 Stat. at L. p. 289.

The proviso with respect to the right of way was:

"Any and all lands reserved to the United States by any act of Congress or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other purposes whatever were reserved and excepted from the operation of the act except so far as it might be found necessary to locate the route of said road through such reserved lands, in which case the right of way, 200 feet in width, is hereby granted subject to the approval of the President of the United States."

In construing the effect of this right of way grant, the court said:

"Certain lands within the present state of Kansas were reserved, while it was still a territory, and long previously by the United States for the use and occupation of the Osage Indians. Such reservation was made by treaty between them and the United States, concluded as far back as June 2, 1825, and proclaimed in December following. From that time and continuously thereafter, the reserved lands were occupied by the Indians until the treaty ceding the lands or parts thereof to the United States. . . . The United States had the authority to authorize the construction

> of the road of the Missouri, Kansas & Texas Railway Company through the reservation of the Osage Indians and to grant absolutely the fee of the 200 feet as a right of way by the company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government."

From the foregoing, it is quite clear that the terms "lands reserved to the United States" or "public reservations" include Indian reservations.

The greater part of counsel's brief is taken up with the question whether or not Indian reservations are "public lands of the United States," and much authority is cited to sustain the negative of that proposition. Such argument and authority is superfluous on the part of the government. Defendant in error concedes at the outset that Indian reservations are not "public lands of the United States." But the significant feature is that the granting act by its terms operates not only upon the "public lands of the United States" but over the "reservations of the United States." The only question then is whether the term "reservation of the United States" includes Indian reservations. And from the very precise determination of that question by the Supreme Court of the United States in the two cases cited above, it is believed that the question is no longer debatable.

Indeed, when the time at which the act was passed and the purposes of the act are taken into consideration, it must be apparent that Indian reservations must have been what Congress had principally in mind in the use of the term "reservations of the United States." The grant was designed obviously to be applicable particularly to the arid west for the purpose of aiding in internal improvements. Since the government at that time had not inaugurated its forest reserve policy, the only other reservations to which it could have been applicable were military reservations.

Military reservations are generally small and compact areas, occupied by forts and barracks, over which there could, in the very nature of things, be no great necessity or opportunity for the construction of irrigation ditches and reservoirs. But since the Indian reservations that had been created by Congress were very generally situated in the arid west, were extensive in area and there were no provisions in the public land laws whereby irrigation companies could procure the right of way for canals and reservoirs upon such lands, a very serious obstacle to highly necessary development might be interposed. So Congress, by departing from the usual language of its right of way grants, whereby grants were made to railroads and for other public purposes over the "public lands" of the United States, clearly indicated its broader purpose by the use of the term "public lands and *reservations* of the United States." Indeed, such has been the interpretation of the Department of the Interior of this act for many years.

In the case of Rio Verde Canal Company, 27 L. D. 421 (opinion of Mr. Secretary Bliss to the Commissioner of the General Land Office, August 25, 1898), it is said:

> "The provisions of Section 18, act of Congress of March 3, 1891, granting a right of way through the public lands and reservations of the United States for irrigation purposes, include Indian reservations, subject to the condition that the location and construction of the ditch or canal shall not interfere with the proper occupation of such reservations by the government for Indian purposes and uses."

This opinion further said:

> "If the route of a canal through an Indian reservation can be so located as not to interfere with the free use and enjoyment of such reservation by the Indians, there is no reason apparent why such reservation should not be subject to the grant of a right of way as any other reservation, and the executive department

> having jurisdiction of such reservation will determine whether it can be so located and will withhold or give its approval accordingly. . . . It is a right inherent in the government by virtue of its sovereignty to authorize the construction of roads and highways through such reservations, although they have been reserved by treaty for the undisturbed use and occupation of the Indians, and the exercise of such right is not a violation of any treaty provision. And further, it is manifest that the purpose of Congress was to grant a right of way through all the public lands and reservations over which it exercised sovereignty, ownership or control, limited only by the condition that such right of way should be so located as not to interfere with the proper occupation by the government of any such reservation."

We are particularly led to the conclusion that Congress intended to include Indian reservations within the language of the act here under consideration for the reason that, by the act of February 15, 1901 (31 Stat. 790, Fed. Stat. Ann. Vol. 6, p. 513), Congress, in conferring authority upon the Secretary of the Interior to grant revocable rights of way for electric power plants, canals, ditches and reservoirs and analogous purposes, specifically included Indian reservations.

The pertinent portion of the language of the act under consideration is:

> "That the Secretary of the Interior be and he is hereby authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States . . . for electrical plants . . . and for canals, ditches . . . and reservoirs used to promote irrigation . . . by any citizen, association or corporation of the United States. . . . Provided, that such permits shall be allowed within or through any of said parks or any forest, military, Indian or other reservation only upon the ap-

> proval of the chief officer of the department under whose supervision such park or reservation falls, and upon a finding by him that the same is not incompatible with the public interest."

We think the whole scope of the act of 1891, the language used and the purposes to be accomplished, clearly indicate that Indian reservations were intended to be included under the language of the act.

The government, in its brief, contends that inasmuch as no permanent easement is granted thereunder, such act of 1901 offers no support to our theory of the scope of the act of 1891. But it will be readily observed that the two acts differ only in the permanency of the right granted. A permit or license from the Secretary of the Interior under the act of 1901, while unrevoked, is equally efficacious to grant all the rights provided for under the earlier act and both would grant rights which would be equally incompatible with the treaty rights of the Indians, if counsel's contention as to such grant being an invasion of these treaty rights is correct.

Again, Section 13 of the act of Congress of June 25th, 1910, shows the view and policy of the government with reference to reservoir sites upon Indian reservations. The authority therein given to the Land Department is to "reserve from location, entry, sale allotment or other appropriation any lands within any Indian reservation valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress." This section, as observed by appellant in its brief, confers upon the Secretary of the Interior, in his discretion, the right to reserve land within Indian reservations for irrigation projects recognized by Congress, and it is pertinent in this discussion, chiefly as showing the intention of Congress not to permit land, which, from its situation, is valuable in reclaiming

the arid west, even when in Indian reservations covered by treaty rights, to be diverted from the highly important purpose of reclamation.

We hardly think it can or will be contended by the government that Congress was without authority to grant these rights of way over Indian reservations, because it has been the uniform holding of the Supreme Court of the United States that Congress was invested with plenary power over Indian property and could, at will, if it chose, by legislative enactment, abrogate any Indian treaty previously made.

> Cherokee Nation v. Hitchcock, 187 U. S. 294, 47 L. Ed. 183.
>
> Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. Ed. 299.

In the latter case (p. 307, L. Ed.), it is said:

> "Indeed the controversy which this case presents is concluded by the decision in Cherokee Nation v. Hitchcock, 187 U. S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property."

We think the foregoing authorities are clearly sufficient to demonstrate beyond doubt that Congress intended to include Indian reservations within the language of the granting act in question, and we do not for a moment wish to be understood by the court as shifting ground or as being uncertain in the position hitherto taken, in pointing out an additional ground why the present action could not lie. An examination of the complaint and the act in question at once raises the consideration whether or not the determination by the Secretary of the Interior of the jurisdictional facts upon which he acted in making his approval does not now prevent a collateral attack upon that decision. We think it is the law beyond any controversy that the approval by the Sec-

retary of the Interior of a land list or a map granting right of way has the force and effect of a patent.

Jamestown Co. v. Jones, 177 U. S. 125, 44 L. Ed. 698.

Noble v. Union River Logging Co., 147 U. S. 165, 37 L. Ed. 123.

Oregon Short Line R. Co. v. Stalker, 14 Ida. 362.

"The general supervision of the affairs of the Land Department is vested in the Secretary of the Interior, who has final control of the public business relating to the public lands."

32 Cyc. 1002, and cases there cited.

"The decisions of the Department of the Interior of the land laws are entitled to great respect at the hands of the court and should not be overruled unless they are clearly erroneous, and in cases of doubt a construction placed upon a statute by the Land Department for a number of years, under which grants have been administered and lands put upon the market and sold, is entitled to great weight."

32 Cyc. 1024.

United States v. Healey, 160 U. S. 136, 40 L. Ed. 369.

Hastings v. Whitney, 132 U. S. 357, 33 L. Ed. 363.

McFadden v. Mountain View Min. Co., 97 Fed. 670.

Hedrick v. Hughes, 15 Wall. 123, 21 L. Ed. 52.

Johanson v. Washington, 190 U. S. 179.

It is shown by the complaint in this action that the Secretary of the Interior gave his unqualified approval to the granting of the right of way easement on June 27, 1903. Under the statute by virtue of which the grant was made, it was clearly provided "that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation." In any right of way

application, the Secretary of the Interior must, of necessity, determine the question of whether or not it does interfere with the occupation by the government before he can grant his approval to the easement asked. In the case of an Indian reservation, the occupation by the government is for the purpose of a residence and habitude for the Indians and also the occupation by the government itself so far as the administration of the affairs of the Indians is concerned. This occupation is usually in connection with the establishment of schools, agency offices and other supervision. The Bureau of Indian Affairs is under the control and jurisdiction of the Secretary of the Interior. When the Secretary of the Interior has decided by his approval thereof that the granting of any right of way does not interfere with the occupation by the government, he acts in an administrative capacity upon a question of fact which cannot be reviewed by the courts except for fraud or mistake. That determination in the case at bar has settled the question of whether or not the permitting of the reservoir easement has been any infringement of the treaty rights of the Indians. If the granting of the easement in question, as has been judicially determined by the Secretary, does not interfere with the proper occupation of the reservation by the government for the purposes for which it was intended, viz., an Indian reservation for the use of the Indians and in connection with the administration of Indian affairs, it seems to us that the only method by which this action could be reviewed is by a suit to set aside and cancel the vested rights acquired by the company on the approval of the map, with such proper allegations of fraud or mistake as would warrant a court of equity in setting the grant aside.

The government's contention seems to be, in part, that the act of March 3rd, 1891, under which the reservoir grant in question was made, was, by necessary implication, repealed by an act of Congress of May 11th, 1898 (30

Stat. 404), amending an act approved January 21st, 1895, entitled "An act to permit the use of a right of way through the public lands for tramroads, canals and reservoirs and for other purposes" (28 Stat. 635). The act of January 21st, 1895, provides that the Secretary of the Interior be and he hereby is authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through public lands of the United States not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs, to the extent of the ground occupied by the water of the canals or reservoirs and fifty feet on each side of the marginal limits thereof or fifty feet on each side of the center line of the tramroad *by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying, or of cutting timber and manufacturing timber.* It will thus be seen that the scope of this grant is entirely distinct from the grant of March 3rd, 1891, which pertains exclusively to the subject of irrigation, while this act has to do only with mining and quarrying and with the lumber industry. The act of May 11th, 1898, amends the act of 1895 by adding thereto two paragraphs, the first of which simply provides that, in addition to mining, quarrying and lumbering, the tramways, canals or reservoirs for which rights of way may be appropriated, may be used for "the purpose of furnishing water for domestic, public and other beneficial uses." It is doubtless true that this language is broad enough to include the use to which water was to be applied under the act of March 3rd, 1891, but it is clear beyond peradventure that it was not intended thereby to repeal the earlier act, because in the succeeding paragraph it is declared

> "That the rights of way for ditches, canals or reservoirs heretofore or hereafter approved under the provisions of sections 18, 19, 20 and 21 of the act of March 3rd, 1891, may be used for purpose of a public nature

> and said rights of way may be used for purposes of water transportation, for domestic purposes or for the development of power as subsidiary to the main purpose of irrigation."

So here, in the amendatory act itself, is an express recognition of the fact, not only that rights of way for ditches and canals had theretofore been approved under the earlier act, but that they might thereafter be approved, and surely there could be no subsequent approval, if at the time it was intended that the act conferring the authority to approve should then and there stand repealed. Instead of an intention to repeal the act of March 3rd, 1891, it was clearly the purpose of Congress to leave it intact and to supplement and enlarge its scope by providing that the canals constructed in accordance with its provisions might be used, not only for furnishing water for irrigation purposes, but also for other purposes of a public nature, such as transportation and power, so long as such purposes were subsidiary to the main purpose of irrigation. It would seem that no more need be said upon this contention of the government since the act relied upon as effecting a repeal of the statute of 1891 clearly and by its terms continues such act in force.

But aside from the general merits of the controversy, it is felt that the form of the action by the government and the relief sought herein cannot be effective even to raise the question sought to be decided. It is argued by counsel for the government, in support of its contention, that the right of occupancy of these lands as a part of the Fort Hall Indian Reservation is guaranteed to the Indians by treaty stipulation and by act of Congress, and there is no law authorizing the Secretary of the Interior to grant to the defendant the privilege of using these lands for reservoir purposes. Such being the contention, then, admittedly, no authority exists in any of the executive departments of the government, directly or indirectly, to convey to or confer

upon the defendant any rights to these lands. But it will be readily conceded that the Secretary of the Interior is the officer who has general supervisory authority and control over the Indians. The Secretary of the Interior is the instrumentality whereby the guardianship of the United States over the Indians and their property is made effectual. Then, surely the Department of Justice, at whose instance this suit is brought, and under whose direction it is being prosecuted, has no greater authority to divest the Indians of their right of possession or to alienate the title of the government than has the Department of the Interior, and, without statutory authority, the court which determines this question has no power, indirectly, to accomplish such an end. In that view, if the suit be prosecuted to judgment, and the defendant pays the full amount claimed, what rights does it acquire? If, as is contended, the approval of the Department of the Interior is without efficacy, what would be the efficacy of a judgment obtained through a suit instituted by the Department of the Interior? What protection would the judicial record afford to defendant in error if subsequently the Department of the Interior charged with the duty of protecting the Indians and vindicating their rights should ignore the proceedings of the Department of Justice and should demand that the lands be vacated? According to plaintiff's contention, in Congress alone rests the power to dispose of the land, and Congress, according to its contention, has not authorized any disposition thereof, either by direct sale, or indirectly, through the operation of a judicial decree. If the government's contention is correct in this case, then there is not, nor ever has been, any means whereby reservoir sites or rights of way for canal systems can ever be acquired in the arid states of the west. All the irrigation systems dependent upon reservoir titles acquired under the uniform practice and holdings of the Department of the Interior for twenty years become void, and, not only that, but there is

no method under the statute of the United States whereby, through the payment of compensation to the Indians, or otherwise, such titles can be obtained and set at rest. This is unthinkable. Congress has, by legislation throughout a course of nearly half a century, provided for obtaining rights of way for public purposes through Indian reservations for railroads, telephone and telegraph lines, for tramways, power plants, and, indeed, every public or quasi-public use, and yet, with Indian reservations of the United States located almost entirely in the arid or semi-arid west, and irrigation being the one public use to which the government itself has devoted millions of dollars, thus emphasizing the importance of this public improvement in the Congressional mind, the government now contends that no method whatever has been pointed out whereby rights of way for necessary reservoirs and irrigation canals over such Indian reservations may be obtained. Lands included within Indian reservations cannot be acquired by condemnation because the fee is in the government, and no tribunal has been provided wherein such condemnation suits could be instituted. We cannot think otherwise than that Congress, having plenary power over Indian reservations, intended by the Act of 1891 to grant rights of way over such reservations for irrigation purposes, the exercise of the right being always subject to the approval of the Secretary of the Interior, who was the very officer having the interests of the Indians in charge. No such right of way, under the terms of the act, should "be so located as to interfere with the proper occupation by the government of any such reservation." The Secretary of the Interior, by his approval in the present case, determined the fact that the reservoir in question was not so located as to interfere with such occupation by the government for Indian purposes. If the Secretary of the Interior had any authority whatsoever to approve the application of a canal company for right of way upon an Indian reservation under any circumstances or

upon any conditions, the propriety or wisdom of his approval cannot now be called into question. It is not subject to collateral inquiry. The only question, therefore, is one of jurisdiction, and to hold that the term "reservation of the United States," as used in the Act of 1891, did not include Indian reservations would be to exclude the only class of reservations upon which the grant could, as a practical matter, operate.

We suggest that the judgment of the lower court is in every respect legal, proper and just, and should be affirmed.

Respectfully submitted,

EDWIN SNOW,

Attorney for Defendant in Error.